

# LIABILITY OF JUDGES OF THE SUPREME ADMINISTRATIVE COURT FOR INFRINGEMENT OF THE EU LAW

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*European Justice Court in Köbler and Traghetti decision defined principles of EU Member State compensatory liability in relation to civil law subjects due to damages caused by judicial authorities' acts breaching EU regulations. Due to lack of proper EU procedural norms, claims against such acts, which in fact are serious errors of Member State's judicial authorities, follow on the base of Member State's rules, both material and procedural. The author discusses the rules on State liability for unlawful judgment in Polish law after their revision in 2010. The analysis of different aspects and consequences of the legislative changes is followed by the discussion of the conditions of State liability.*

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## INTRODUCTION

The liability of the State Treasury for damage caused by unlawful administrative court judgments should be separated from the potential liability of an administrative court judge.

The internal law of a Member State whose judicial authority infringed EU legislation has detailed procedural norms in this respect. The Member States hold conditional autonomy limited by the rule of equivalency (domestic procedural regulations cannot be less favourable to claims based on EU law than to similar claims based upon domestic law) and effectiveness (the application of domestic procedural regulations cannot prevent or considerably hinder the seeking of claims based upon EU law).

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The amendment to administrative court procedures of 2010, which introduced the institution of complaint about unlawfulness of the judgment of the Supreme Administrative Court in the event of a flagrant violation of EU law, has ensured the execution of EU law standards in the scope of compensatory liability of the Member State for the infringement of the EU law.

I. LIABILITY OF THE STATE TREASURY FOR DAMAGE CAUSED BY THE  
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According to Article 77 of the Constitution of Poland, everyone shall have the right to compensation for any harm done to him by any action of an organ of public authority contrary to law.

Next, pursuant to Article 417 (1) [prim] § 2 sentence 1 of the Polish Civil Code, after its revision in 2010, if damage has been inflicted by unlawful non-revisable court decision or other final decision, its compensation demand can be raised after the declaration of non-compliance of that decisions (s) in proper proceedings, unless separate regulations provide otherwise.

According to Article 285a § 1 of the Law on proceedings before administrative courts, a motion for a declaration of a legally binding judicial decision unlawful may be lodged against a legally binding judicial decision of a voivodship administrative court, where such a decision has resulted in harm to the party and has not been and cannot be modified or reversed by other means of recourse available to the party. A motion shall not be lodged against judicial decisions of the Supreme Administrative Court, with the exception where the unlawfulness (of the decision) results from a flagrant breach of the rules of the European Union law. (§ 3).

The motion for a declaration of a legally binding judicial decision of the Supreme Administrative Court unlawful is the effect of the ECJ judgment in case C-224/01 *Köbler*<sup>1</sup> as well as the judgment of the Polish Constitutional Tribunal of December 8, 2009 in case SK 34/08.<sup>2</sup>

In that ECJ judgment has been clarified that the principle of liability of Member States for breach of EU law also applies if the damage was caused by the unlawful judgment of the last instance court of the Member State.

In accordance with the solution adopted in Polish law, the full enforcement of the *Köbler* judgment requires the cooperation between

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<sup>1</sup> ECJ Judgement of 30th September 2003 r., ECR 2003, p. I-10239.

<sup>2</sup> OTK ZU 2009, nr 11, poz. 165.

administrative and civil court.

According to Polish law, the judgment declaring a legally binding judicial decision unlawful pursuant to Article 285a of the Law on proceedings before administrative courts is *sine qua non* condition for compensation from the Treasure of State for a damage caused by the unlawful judicial decision, according to Article 417<sup>1</sup> § 2 of the Civil Code.

Hence, the role of the Supreme Administrative Court is to assess whether the Supreme Administrative Court actually issued the judgment which is “a flagrant breach of the provisions of European Union law”. The concept of “a flagrant breach” used in the law on proceedings before administrative courts must correspond to the concept of “sufficiently serious”, mentioned in the *Köbler* case.

In the *Köbler* judgment ECJ stated, that an infringement of Community law will be sufficiently serious where the decision concerned was made in manifest breach of the case-law of the Court in the matter<sup>3</sup>.

Other situations of non-compliance with EU law will be subject to the discretion of the national courts, provided that the term “sufficiently serious” breach of EU law must be interpreted with regard to its autonomous nature.

In addition, it should be noted that, in accordance with the *Traghetti* judgment, it is possible to limit the State liability solely to cases of intentional fault and serious misconduct.

Due to division of powers between the administrative and civil courts, the issue to be resolved is that which court is obliged to assess the damage within the meaning of the *Köbler* judgment. It seems that the administrative court should examine only the proof for the possibility of harm. According to Article 285e § 1 point 4 of the Law on proceedings before administrative courts, a motion for the declaration of a legally binding judicial decision unlawful shall contain, i.e. “the proof for the possibility of harm being caused by issuance of the judicial decision to which the motion relates”. Further assessment of whether the conditions of Article 417 (1) § 2 of the Civil Code have been met and whether the compensation is reasonable and, possibly, how much, should make a civil court.

To meet the requirements specified in Article 285e § 1 point 4 of the Law on proceedings before administrative courts, the possibility of harm must be connected with flagrant breach of specific rule of EU law.

If the Supreme Administrative Court will be inclined to agree to the complainant’s arguments, the Court, granting the motion, shall declare

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<sup>3</sup> *Köbler* judgment, point 56.

contested judicial decision—in requested scope—unlawful.

The Court shall reject the motion, particularly if complainant does not indicate the possibility of harm or specific rule of EU law, which has been flagrant breached and caused—in opinion of complainant—harm.

## II. PERSONAL LIABILITY OF THE OFFICIALS OF JUSTICE ADMINISTRATION FOR JUDICIAL ACTION

Another issue is a personal liability of the officials of administration of justice. That is a quite complex question.

In accordance with Recommendation CM/Rec (2010)12 of the Committee of Ministers, Council of Europe, to member states on judges: independence, efficiency and responsibilities, adopted by the Committee of Ministers on 17 November 2010 the interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence (item 66). Only the state may seek to establish the civil liability of a judge through court action in the event that it has had to award compensation (item 67). The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to criminal liability, except in cases of malice (item 68).

In today's Europe, the encroachment of civil liability rules into the sphere of the judicial power, gradually breaks so-called judicial immunity—judge's complete protection from personal liability for exercising judicial functions.

The recourse liability of these persons (pursued by State Treasury) is possible only in case of intentional fault (*dolus*) or severe negligence (*culpa lata*).

In Polish law, the fault can substantiate *personal tort* liability of the judge (for example in case of fraud or influence peddling) both in proceedings initiated by a victim of a tort and in recourse proceedings, initiated by State Treasury on the basis of the provisions of the Polish Labour Code.

Another separate issue is also disciplinary liability and responsibility of judges.

In matters not regulated by the Act of 25th July 2002 Law on System of Administrative Courts, the provisions on the system of common courts and on Supreme Court concerning disciplinary liability shall apply, as appropriate, to voivodship administrative courts judges and to Supreme Administrative Courts Judges.

In accordance with the established disciplinary case—law of the Supreme Court of Poland, the rule of judicial independence excludes from the scope of notion “manifest and flagrant breach of law regulations”, referred in Article 107 § 1 of the Act of 27 July 2001—Law on the System of Common Courts, errors in interpretation and application of substantial law. It follows therefrom that disciplinary transgression can include in practice only breach of procedural rules.<sup>4</sup>

It should be also mentioned, that Act of 20 January 2011 on personal liability of a public servants for flagrant breach of law (Journal of Laws—Dz. U. of 2011, No. 34, item 173) does not apply to judges. Art. 1 of above mentioned Act defines public servant—as a person acting as a public administration authority or as a person acting on the basis of its authorization or as a member of a collegial body of public administration.

#### CONCLUSION

From 2012, the norms of the Polish administrative court procedures through the introduction of the institution of a complaint about unlawfulness of a valid judgment provided for compensatory liability of the State Treasury for violation of EU law in the event of the damage has been caused by a judgment of the Supreme Administrative Court (last-instance court) non-compliant with EU law. However, it should be added that the liability would only appear if the non-compliance should result from flagrant violation of EU law norms.

Under the Polish legal order, the declaring of unlawfulness of the Supreme Administrative Court judgment in the administrative court proceedings is a necessary premise for the entity to pursue compensation from the State Treasury for damage caused by the Supreme Administrative Court judgment in a civil law procedure.

Under the Polish legal system, an administrative court judge is not personally liable for judicial decisions. It is only possible to impose recourse liability on the judge in the event of intentional fault or severe negligence. The judge is subject to disciplinary liability.

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<sup>4</sup> E. Bagińska, J. Parchomiuk, *Odpowiedzialność odszkodowawcza w administracji, [w:] System Prawa Administracyjnego* (red. R. Hauser, Z. Niewiadomski, A. Wróbel), wyd., s. 571-572 (Warszawa, C.H. Beck / Instytut Nauk Prawnych PAN 2010).